LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 29 1968
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1967

No. 1222

GEORGIA WIGGINS, DONALD MARTIN COOPER, LEWIS CHERRY, ERVIN CHERRY, GOLDEN FRINKS, JAMES SPELLER, J. ALFRED CHERRY, CLIFTON JORDAN, DAVID BOND, HARVEY RANDOLPH SPELLER, JR., GEORGE L. ROUNTREE, TIM HAYES JORDAN, and NATHANIEL LEE, JR.,

Petitioners,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

T. W. BRUTON
Attorney General of North Carolina

RALPH MOODY
Deputy Attorney General

Justice Building
Raleigh, North Carolina

Counsel for the State of North Carolina,
Respondent.

INDEX

OPINION BELOW ---- 1

JURISDICTION ---- 1

QUESTIONS PRESENTED ---- 1

STATEMENT OF THE CASE ---- 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ---- 4

SUMMARY OF ARGUMENT ---- 5

ARGUMENT:

I. DID THE PETITIONERS PROPERLY RAISE A CONSTITUTIONAL QUESTION AS TO THE SHERIFF SUMMONING THE JURORS AND ALSO TESTIFYING AS A WITNESS FOR THE STATE IN THE CASE? ---- 6

II. THE PETITIONERS WERE NOT DENIED ANY RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THE SHERIFF SELECTED THE JURY PANEL FROM WHICH THE TRIAL PANEL WAS CHOSEN AND ALSO TESTIFIED AS A WITNESS FOR THE STATE. ---- 8

CONCLUSION ---- 9

Table of Cases

Edelman v. California, 344 U. S. 357, 358; 97 L. ed. 387; 73 S. Ct. 293 ---- 7

Irvine v. California, 347 U. S. 128, 129; 98 L. ed. 561, 567; 74 S. Ct. 381 ---- 7

State v. Jones, 242 N. C. 563, 564; 89 S. E. 2d 129 ---- 7

Turner v. Louisiana, 379 U. S. 466; 13 L. ed. 2d 424; 85 S. Ct. 546 ---- 8

Table of Statutes

General Statutes of North Carolina:

Sec. 9-11 ---- 4, 8

Sec. 9-12 ---- 6

Sec. 14-273 ---- 4

Supreme Court of the United States

October Term, 1967

No. 1222

GEORGIA WIGGINS, DONALD MARTIN COOPER, LEWIS CHERRY, ERVIN CHERRY, GOLDEN FRINKS, JAMES SPELLER, J. ALFRED CHERRY, CLIFTON JORDAN, DAVID BOND, HARVEY RANDOLPH SPELLER, JR., GEORGE L. ROUNTREE, TIM HAYES JORDAN, and NATHANIEL LEE, JR.,

Petitioners,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinion Below

The Opinion of the Supreme Court of North Carolina is reported at 272 N. C. 147 (No. 2 Advance Sheets of Supreme Court of North Carolina—Issued December 27, 1967); 158 S.E. 2d 37. The Opinion is printed in the Appendix to the Petitioners' brief, pp. la - 18a.

Jurisdiction

The Petitioners attempt to invoke the jurisdiction of this Court pursuant to 28 USC 1257(3).

Questions Presented

The Respondent, State of North Carolina, submits the following as the questions presented in this case:

(1) Did the Petitioners properly raise and present to the Supreme Court of North Carolina the alleged constitutional questions which they are requesting this Court to pass upon?

(2) Assuming that Petitioners properly raised and presented to the Supreme Court of North Carolina the constitutional question here asserted before this Court: Were Petitioners denied any rights under the Due Process Clause of the Fourteenth Amendment because the Sheriff testified at the trial of Petitioners as a witness for the State?

Statement of the Case

The Petitioners, other than the Petitioner, Golden Frinks, were indicted for willfully and unlawfully interrupting and disturbing the Southwestern High School in Bertie County, North Carolina. The Petitioner, Golden Frinks, was charged with willfully and unlawfully aiding and abetting in interrupting and disturbing the same High School. The Petitioners were all tried at the February 6, 1967, Term, of the Superior Court of Bertie County and were all convicted by the jury. The Trial Court rendered judgment that all the Petitioners pay fines except the Petitioner, Golden Frinks, and he received a jail sentence of 60 days (R. 120). The fines ranged from $10.00 and the costs in some cases to $50.00 and the costs in others. The Petitioners all appealed to the Supreme Court of North Carolina, which Court affirmed the judgment below as will be seen from the Opinion of the Supreme Court of North Carolina attached as an Appendix to the Petitioners' brief.

The property of the Southwestern High School, a public school of the State system, has 400 to 500 feet frontage on Highway 308. On September 13, 1966, a class in Masonry consisting of 16 pupils was in progress at the entrance of the driveway into the school property. The class was engaged in building brick columns at this entrance which was some 10 to 25 feet from the highway. About 8:30 A.M. the Petitioner, Frinks, drove up in an automobile in front of other automobiles; he had several people with him in his automo-

bile. All of these persons got out of the cars near the school property and on the shoulder of the highway and the Petitioner, Frinks, handed out some signs to some twenty people who had come there at that time, there being eleven signs in all. These signs were introduced in evidence and a statement of the writing on the signs will be found on R. 103, 104. These persons carried the signs along the ditch and those with them began to picket or walk along the ditch bank between the paved road and the paved portion of Highway 308 and the school campus. Before this picketing or marching began the Sheriff of the County came up and warned the Petitioners as to the existence of the statute dealing with the disturbance of a school and under which the Petitioners were prosecuted. The Sheriff asked the Petitioner, Frinks, if he knew that there was a statute forbidding the interrupting of a public school. The Petitioner, Frinks, replied: "I don't care anything about what is in the statute books." (R. 102) After the school session began, these Petitioners started to march in front of the school property with the exception of the Petitioner, Frinks, who stayed about ten minutes and then went to a nearby house to observe the proceedings. This marching or picketing continued for about twenty minutes, and during this time the students, who had been brought by the teacher to a point near the road to construct brick columns, had their attention diverted from the work assigned to them and some of them laid down their tools and equipment to observe the Petitioners. The pupils were told by the teacher to continue their work and they failed to do so because of the Petitioners and the signs carried by them. The teacher found it necessary to abandon the Masonry class and to take the students back to their workshop.

Inside the school building there were some classrooms which faced the highway, and the pupils in these classrooms left their seats and went to the windows where they watched the proceedings of the Petitioners, and those pupils whose classrooms were on the far side of the building from the highway left their classrooms and went into the hall so they could see what was going on. It became necessary for the

Principal of the school to go into the building and halls and order the pupils to return to their classrooms and to direct those at the windows to take their seats and go on with their class work. This disturbance and interruption of the normal course of classes went on for ten to fifteen minutes (see evidence of Sheriff Daniels, R. 102), and evidence of J. S. Singleton, Principal of the school, R. 91; and see evidence of Grover C. Holmes, Masonry teacher, R. 98).

Constitutional and Statutory Provisions Involved

The Petitioners were convicted under Sec. 14-273 of the General Statutes of North Carolina, which reads as follows:

> "If any person shall willfully interrupt or disturb any public or private school or temperance society or organization or any meeting lawfully and peacefully held for the purpose of literary and scientific improvement, or for the discussion of temperance or question of moral reform, either within or without the place where such meeting or school is held, or injure any school building, or deface any school furnture, apparatus or other school property, or property of any temperance society or organization, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisonment not more than thirty days."

The statute under which the jury was organized is Sec. 9-11 of the General Statutes of North Carolina and reads as follows:

> "That there may not be a defect of jurors, the sheriff shall by order of the court summon, from day to day, of the bystanders, other jurors, being freeholders, within the county where the court is held, or the judge may, in his discretion, at the beginning of the term direct the tales jurors to be drawn from the jury box used in drawing the petit jury for the term, in the presence of the court; such tales jurors so drawn to be summoned by the sheriff and to serve on the petit jury, and on any day

the court may discharge those who have served the preceding day. The judge may, upon his own motion, or upon the request of counsel for either plaaintiff or defendant, instruct the sheriff to summon such jurors outside of the courthouse. It is a disqualification and ground of challenge to any tales juror that such juror has acted in the same court as grand, petit or tales juror within two years next preceding such term of court.'"

The Petitioners attempt to bring their case within a portion of the Fourteenth Amendment of the Constitution of the United States, which portion is as follows:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Summary of Argument

The State of North Carolina will argue that the method of summoning the jury was valid and according to a long-time local State procedure. The State will further argue that if there were any objection to this procedure, then a procedural statute gave the Petitioners the right to object, ask for an investigation and request the Court to have some other person select the jury panel. The State will further argue that there was no race discrimination in the jury selected, since, as shown by R. 33, six members of the trial panel were Negroes and the other six were white persons. The State will further argue that the selection of the members of the jury and their being summoned by the Sheriff was not properly excepted to and the question raised before the trial court.

The State of North Carolina will further argue that no prejudice has been shown on the part of the Petitioners adversely affecting their rights for that there is no evidence

that the Sheriff talked about the case to any of the jurors or that he took any action adversely to the Petitioners other than to testify as a witness for the State, and none of the Petitioners refuted any of his evidence. The State will, therefore, argue that there has been no violation of the Petitioners' constitutional rights in violation of the Due Process Clause.

Argument

I

DID THE PETITIONERS PROPERLY RAISE A CONSTITUTIONAL QUESTION AS TO THE SHERIFF SUMMONING THE JURORS AND ALSO TESTIFYING AS A WITNESS FOR THE STATE IN THE CASE?

It is the contention of the State of North Carolina that the Petitioners never at any time presented to the trial court the question of whether it was proper for the Sheriff to summon the panel of jurors from which the trial panel was selected. We again emphasize that the trial panel was composed of six Negroes and six white persons (R. 33). If the Petitioners had wished to raise this question they had available to them a procedural statute for this purpose. Section 9-12 of the General Statutes of North Carolina provides as follows:

> "When, in the trial of any action before a jury, the sheriff of the county in which the case is to be tried is a party to or has any interest in the action, or when the presiding judge finds upon investigation that the sheriff of the county is not a suitable person, on account of indirect interest in or relative to the cause of action, to be entrusted with the summoning of the tales jurors in any particular case pending, such judge shall appoint some suitable person to summon the jurors in place of the sheriff."

The trial judge found (R. 31) that the jury system of the

County was unconstitutionally organized and ordered the Sheriff to summon 50 persons qualified to serve on the jury (R. 32). The Sheriff carried out the order, and, as above stated, the trial panel consisted of six Negroes and six white persons. The Petitioners never at any time invoked the above-quoted statute or raised the constitutional question now presented before the trial court with a request that he pass upon the question. The Petitioners for the first time raised the question before the Supreme Court of North Carolina in an assignment of error which is quoted in a footnote to the Petitioners' brief, beginning on p. 4.

The attempt to raise the question for the first time on appeal is not approved by this Court (IRVINE v. CALIFORNIA, 347 U. S. 128, 129; 98 L. ed. 561, 567, 74 S. Ct. 381). This is also the law in North Carolina (STATE v. JONES, 242 N. C. 563, 564, 89 S. E. 2d 129, and see: EDELMAN v. CALIFORNIA, 344 U. S. 357, 358; 97 L. ed. 387; 73 S. Ct. 293).

When the Petitioners first made up their assignments of error in the Supreme Court of North Carolina they mentioned this question for the first time, as will appear on R. 136, and which is the assignment quoted in the footnote to their brief. However, if the Court will refer to where Exception No. 11 actually appears in the record (R. 90) it will be seen that nothing at all was said to the Court about the matter nor was the Court ever asked to rule on the question. On p. 89 of the record the Sheriff was examined as to his method of selecting the jury, which begins on p. 90, but the import of the conversation between counsel for Petitioners and the Court was that counsel for Petitioners did not have any evidence of any improper conduct but wished to make an inquiry.

If the Court will examine the brief of the Petitioners filed in the Supreme Court of North Carolina the Court will see that the main attack was that the jury statute was unconstitutional for vagueness, that the Petitioners had a right guaranteed by the First Amendment to picket and do the

acts complained of, and when it came to the selection of the jury the chief complaint was that the Court had no right to have the Sheriff summon a panel of jurors because the Petitioners had a right to be tried by jurors selected according to the regular system, and, therefore, this panel being unconstitutionally organized apparently Petitioners thought they could not be tried at all.

II

THE PETITIONERS WERE NOT DENIED ANY RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THE SHERIFF SELECTED THE JURY PANEL FROM WHICH THE TRIAL PANEL WAS CHOSEN AND ALSO TESTIFIED AS A WITNESS FOR THE STATE.

Section 9-11 of the General Statutes of North Carolina permitting the Court to order the Sheriff to summon other jurors when there is a defect of jurors goes back to the Year 1779. There is no evidence that the Sheriff said anything whatever about the case to any member of the panel of jurors summoned by him and from which the trial panel was selected.

In the Case of TURNER v. LOUISIANA, 379 U. S. 466, 13 L. ed. 2d 424, 85 S. Ct. 546, a deputy sheriff by the name of "Simmons" was one of the principal witnesses for the prosecution and had testified to certain damaging admissions which he said Turner had made to him at the time of his apprehension. Two deputy sheriffs "were in this close and continual association with the jurors," and it appears from the evidence in the footnote to the case that Simmons had spoken to the jury several times although he denied discussing the case. He had taken meals with the jury, sitting at the same table with them, and had ridden in automobiles with members of the jury and had had various relationships with the jury.

In the Turner Case counsel for the Petitioner, Turner,

was diligent and moved for a mistrial when each one of these two deputies testified as witnesses.

Therefore, unless it is conclusively presumed to be a violation of the Constitution because the Sheriff summoned the panel, there is no analogy between this case and the Turner Case. The Sheriff here did not associate with the trial jury or talk with them nor is there a single shred of evidence that the Sheriff said anything about the case to any member of the jury that he summoned; there is no evidence whatsoever that the Sheriff had acquired any influence over the members of the trial panel as appeared in the Turner Case. One might as well say that the whole jury system was bad because when the panel of jurors for the session of court is summoned by names drawn from the regular jury list. then such jurors are incompetent because the Sheriff summoned them.

There is not a shred of evidence in the record that any juror in the trial panel who sat upon the case and voted to convict the Petitioners was challenged by any of the Petitioners. We assume that the Petitioners examined each juror on voir dire and asked if they had discussed the case with anyone. There is no evidence that any member of the trial jury had discussed the case with anyone at all, much less the Sheriff.

Conclusion

Petitioners were convicted by a trial jury of which six members were members of their own race. There is no evidence whatsover that any of their rights were violated, and, to the contrary, there is ample evidence that they willfully disturbed a public school of the State. The Petitioners did not see fit to testify in the case or in any manner to attempt to refute any of the evidence of the State.

The State of North Carolina submits, therefore, that the Petitioners did not properly raise the question which they are now asserting before this Court, the question was not

passed upon by the trial court, and that there is no evidence of any prejudice to the Petitioners in their trial, and, therefore, there is no Federal question to be passed upon. The State of North Carolina, therefore, contends this Application for Certiorari should be dismissed.

Respectfully submitted,

T. W. BRUTON
Attorney General of North Carolina

RALPH MOODY
Deputy Attorney General

Justice Building
Raleigh, North Carolina

Counsel for the State of
North Carolina, Respondent.